

§ 150.441

the authenticity of a proposed hearing exhibit.

(b) A party may introduce a proposed hearing exhibit following the times for submission specified in §150.437 only if the party establishes to the satisfaction of the ALJ that it could not have produced the exhibit earlier and that the opposing party will not be prejudiced.

§ 150.441 Prehearing conferences.

An ALJ may schedule one or more prehearing conferences (generally conducted by telephone) on the ALJ's own motion or at the request of either party for the purpose of any of the following:

- (a) Hearing argument on any outstanding discovery request.
- (b) Establishing a schedule for any supplements to the submissions required by §150.437 because of information obtained through discovery.
- (c) Hearing argument on a motion.
- (d) Discussing whether the parties can agree to submission of the case on a stipulated record.
- (e) Establishing a schedule for an in-person hearing, including setting deadlines for the submission of written direct testimony or for the written reports of experts.
- (f) Discussing whether the issues for a hearing can be simplified or narrowed.
- (g) Discussing potential settlement of the case.
- (h) Discussing any other procedural or substantive issues.

§ 150.443 Standard of proof.

- (a) In all cases before an ALJ—
 - (1) CMS has the burden of coming forward with evidence sufficient to establish a prima facie case;
 - (2) The respondent has the burden of coming forward with evidence in response, once CMS has established a prima facie case; and
 - (3) CMS has the burden of persuasion regarding facts material to the assessment; and
 - (4) The respondent has the burden of persuasion regarding facts relating to an affirmative defense.
- (b) The preponderance of the evidence standard applies to all cases before the ALJ.

45 CFR Subtitle A (10–1–08 Edition)

§ 150.445 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate; for example, to exclude unreliable evidence.

(c) The ALJ excludes irrelevant or immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence is excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in the Federal Rules of Evidence.

(g) Evidence of acts other than those at issue in the instant case is admissible in determining the amount of any civil money penalty if those acts are used under §§150.317 and 150.323 of this part to consider the entity's prior record of compliance, or to show motive, opportunity, intent, knowledge, preparation, identity, or lack of mistake. This evidence is admissible regardless of whether the acts occurred during the statute of limitations period applicable to the acts that constitute the basis for liability in the case and regardless of whether CMS's notice sent in accordance with §§150.307 and 150.343 referred to them.

(h) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(i) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless the ALJ orders otherwise for good cause shown.

(j) The ALJ may not consider evidence regarding the willingness and ability to enter into and successfully complete a corrective action plan when that evidence pertains to matters occurring after CMS's notice under §150.307.